80-2148

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THIRTY-SIX THOUSAND ONE HUNDRED TWENTY-FIVE DOLLARS IN UNITED STATES CURRENCY, THIRTY-FIVE DOLLARS IN COLOMBIAN CURRENCY AND THIRTY-THREE DOLLARS IN BELIZE CURRENCY, DAVID LEE ALBRECHT AND THE LAW OFFICES OF SERRA, PERELSON, METCALF AND ARCHULETA,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

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PETITION FOR CERTIORARI

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June 15, 1981

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QUESTIONS PRESENTED

1. Whether the Government may, on its own initiative, delay a civil forfeiture proceeding under 31 U.S.C. § 1101 *et seq.* for an undetermined length of time where (a) the Government's sole reason for delay is its investigation of "other possible criminal charges" concerning the claimant of the seized monetary instruments, and (b) the claimant has formally and in writing demanded institution of forfeiture proceedings at the earliest possible date.

2. Whether a plea of guilty to offenses described in 31 U.S.C. § 1101(a)(1)(B) and 31 U.S.C. § 1058 bars a claimant from asserting his constitutional civil due-process rights in a subsequent forfeiture proceeding.

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

THIRTY-SIX THOUSAND ONE HUNDRED TWENTY-FIVE DOLLARS IN UNITED STATES CURRENCY, THIRTY-FIVE DOLLARS IN COLOMBIAN CURRENCY AND THIRTY-THREE DOLLARS IN BELIZE CURRENCY, DAVID LEE ALBRECHT AND THE LAW OFFICES OF SERRA, PERELSON, METCALF AND ARCHULETA,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

PETITION FOR CERTIORARI

Petitioners, David Lee Albrecht, claimant of the defendant monetary instruments, and the Law Offices of Serra, Perelson, Metcalf and Archuleta, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on March 16, 1981.

OPINION BELOW

The opinion of the Court of Appeals, unreported, appears in Appendix A hereto. The opinion of the District Court for the Eastern District of Louisiana, not yet reported, appears in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 16, 1981 and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

See Appendix C for full text of statutory provisions involved.

28 U.S.C. § 1254	19 U.S.C. § 1305(a)
31 U.S.C. § 1058	19 U.S.C. § 1602
31 U.S.C. § 1101	19 U.S.C. § 1603
31 U.S.C. § 1102	19 U.S.C. § 1604
31 U.S.C. § 1104	19 U.S.C. § 1610

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked because 31 U.S.C. § 1101 *et seq.* and 19 U.S.C. § 1604 require that forfeiture proceedings be instituted in the United States District Court against any object seized for violation of the customs laws.

On October 27, 1977, David Lee Albrecht, an American citizen, entered the United States at New Orleans International Airport upon his return from a trip to Central America. On his written customs declaration and orally, Albrecht stated that he was entering the United States with less than $5,000.00 in U.S. currency. Upon inspection of his luggage, The Customs Service discovered that Albrecht was, in fact, carrying in excess of $36,000.00 in U.S. currency plus small amounts of Colombian and Belize currency. Albrecht was arrested and the currency in his possession placed under seizure.

Albrecht pleaded quilty to a violation of 31 U.S.C. § 1101(a)(1)(B) on March 3, 1978 and was sentenced under 31 U.S.C. § 1058 to three years supervised probation and fined one thousand dollars, which fine was suspended pending the outcome of the civil forfeiture proceedings that were to be commenced against the subject monetary instruments.

Within two weeks after Albrecht's arrest, The Customs Service reported the case to the United States Attorney for the Eastern District of Louisiana by written report dated November 10, 1977, made in "accordance with 19 U.S.C. § 1603," which requires customs officers to "report promptly" to the United States Attorney any seizure for which legal proceedings are required. Several days later, on or about November 15, 1977, undersigned counsel, John A. Stassi II, personally called upon Leonard P. Avery, Assistant United States Attorney, to whom the forfeiture matter had been referred. Counsel informed Avery that he represented Albrecht and requested that he be notified as soon as the Government commenced a proceeding seeking forfeiture of the subject monetary instruments. Counsel wrote Avery on January 3, 1978, to confirm that as of that date no action had been commenced to effect the forfeiture and that counsel for Albrecht would be notified promptly upon commencement of any forfeiture proceeding. (R. p. 93) On May 26, 1978, after Albrecht's guilty plea, counsel formally demanded that the Government institute a forfeiture proceeding at the earliest possible date. (R. p. 94).

On June 7, 1978, customs agent, Steven DeVaughn, reported this case to the United States Attorney for the second time, "in accordance with 19 U.S.C. § 1603." This second report included the details of Albrecht's guilty plea to the criminal charge on March 3, 1978. (Supp. R. Ex. 23) Eight months later on February 9, 1979, almost a year after Albrecht's guilty plea, the

Government notified Albrecht that it intended to institute forfeiture proceedings. New Orleans counsel was not informed of this action.

Dale B. Metcalf, Albrecht's California counsel, advised the Government on March 26, 1979, that Albrecht had assigned his interest in the subject monetary instruments and that no administrative petition for remission would be filed. Metcalf further advised that any right the Government may have had to forfeiture had terminated due to substantial delay in the filing of a complaint for forfeiture. (Supp. R. Ex. 25)

On May 15, 1979, for the third time, Customs referred the case to the United States Attorney. (Supp. R. p. 8) The Government instituted this suit in the United States District Court in New Orleans on May 17, 1979, approximately eighteen months after Albrecht's money had been seized. Notice of the suit was served on Metcalf by certified mail on June 11, 1979, after Government representatives in New Orleans had been served with process in an action filed in the Northern District of California to recover the money. (Supp. R. Ex. 31, R. p. 127) The California action was eventually transferred to be consolidated with this action. The United States Attorney failed to notify New Orleans counsel of these actions, and he was not served with process herein.

The case went to trial on March 12, 1980. Despite relevancy objections by defendants, the Government

offered evidence of a continuing investigation of Albrecht relative to "other possible criminal charges." The petitioners contended at trial that the Government's failure to initiate forfeiture proceedings for eighteen (18) months, despite repeated demands to do so, violated the constitutional due-process requirement for immediacy in post-seizure forfeiture hearings as expressed in 19 U.S.C. §§ 1602-1604, statutes which require prompt institution of forfeiture proceedings against property seized pursuant to the customs laws. The District Court held that the investigation of other possible charges justified the Government's delay in filing the complaint for forfeiture herein. In the alternative, the Court held that any right the defendant had to a prompt hearing had been waived by his guilty plea.

The United States Court of Appeals for the Fifth Circuit summarily affirmed this holding in an opinion rendered on March 16, 1981.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals.

The United States Court of Appeals for the Fifth Circuit summarily affirmed the decision of the District Court for the Eastern District of Louisiana which permitted an eighteen-month delay by the United States Attorney in initiating post-seizure forfeiture

proceedings. This decision conflicts with the Ninth Circuit holding in *Ivers v. United States*, 581 F.2d 1362 (C.A. 9-1978). There, Ivers entered the United States from Canada and was arrested under 31 U.S.C. § 1101 and § 1058 for failing to report to Customs that he was carrying $40,998.86 in U.S. Currency. The money he was carrying was seized under 31 U.S.C. § 1102. Ivers pleaded guilty and was sentenced to six months in jail and fined $1,000.00. Three and one-half weeks after the seizure occurred, the District Director of Customs sent Ivers a letter informing him that his money had been seized by the Government and that he had the right to petition for administrative relief from this penalty. Ivers then requested, through his attorney, an extension of time in which to file his petition for relief and further requested that "during the pendency of this extension no forfeiture proceedings be commenced by the United States or any of its agencies." *Ivers v. United States, supra*, p. 1366. Customs honored Ivers' request; the case was not referred to the United States Attorney for sixteen and one-half months while administrative proceedings were pending. One month after the Customs Service rendered its decision denying Ivers's petition for administrative relief and the case had been sent to the United States Attorney for prosecution, Ivers filed suit for return of the funds and the Government counterclaimed for forfeiture. Ivers argued that the delay between seizure and institution of forfeiture proceedings deprived him of his property without due process of law. The Ninth Circuit agreed that serious Fifth Amendment considerations were in-

volved, citing *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971) as authority for the premise that forfeiture statutes, in order to withstand constitutional attack, must impose an explicit obligation upon the Government to commence judicial proceedings promptly to consummate the forfeiture. The Ninth Circuit relied upon constitutional guarantees of due process in holding that the Government did have an obligation promptly to provide a claimant an opportunity for a judicial hearing on the propriety of the forfeiture and held that the delay was excusable only since it was caused by the defendant's request. The Court also held that the pendency of an administrative hearing standing alone does not excuse an eighteen-month delay in initiating proceedings. The Court explained that the parties were not precluded from agreeing that judicial action should be postponed. The holding ". . . simply prevents the unilateral adoption of that course [postponing initiation of forfeiture proceeding] by the Government." *Ivers, supra*, p. 1372. This unilateral conduct on the part of the Government prohibited by *Ivers* is patent in the present case, the Government deciding to delay forfeiture proceedings in contravention of Albrecht's rights under the Fifth Amendment and 19 U.S.C. 1602-1604 and never informing him during the entire eighteen-month period of the reason for the delay or its expected duration.

The District Judge stated in *dicta* that *Ivers* never decided whether 19 U.S.C. §§ 1602-1604 were

applicable to seizures under 31 U.S.C. § 1102. This is incorrect. Although the *Ivers* court did not apply these statutes, it held that all proceedings involving seizures by Customs officers were governed by the Customs Services general regulations, *i.e.* 19 U.S.C. §§ 1602-1604. *Ivers v. United States, supra*, p. 1370. The Court chose to rely on the Fifth Amendment, rather than §§ 1602-1604, however, explaining a frequently-noted problem with these statutes. 19 U.S.C. §§ 1602-1604 divide the forfeiture proceedings into three stages: (1) the seizing officers' report to the appropriate customs officer (§ 1602); the appropriate customs officer's report to the United States Attorney (§ 1603); and the institution of court proceedings by the United States Attorney (§ 1604). *Ivers v. United States, supra*, p. 1369. Sections 1602 and 1604 direct the seizing officer and the United States Attorney to cause forfeiture proceedings to commence "forthwith" and "without delay." Section 1603 contained no requirement of promptness. Since the delay complained of in *Ivers* falls under actions directed in 1603, the Court reasoned that although the statute was not sufficiently specific as to immediacy, the Constitution provided the necessary requirement of promptness under the due-process clause. Sections 1602-1604 of 19 U.S.C. were mentioned by this Court in a footnote to *Thirty-Seven Photographs, supra*, wherein this Court questioned the constitutionality of these statutes because they failed to provide specific time

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* *Ivers* was decided September 18, 1978; 19 U.S.C. 1603 was amended October 3, 1978 to add the word "promptly." [Pub. Law 95-410; 92 Stat. at Lge. 896]

limits for commencing and finalizing civil forfeitures. This Court found that § 1604 could not be used to cure the invalidity of 19 U.S.C. § 1305(a), which authorizes seizures of obscene materials by customs collectors.

Although the Ninth Circuit ultimately relied on the Fifth Amendment in *Ivers*, it recognized that laws restricting the Government's discretion in determining when to bring post-seizure forfeiture proceedings are essential to justify such seizures under the United States Constitution. The Fifth Circuit opinion in the present case in effect holds that the Government's discretion is not to be questioned by any claimant who has entered a guilty plea to a customs law violation.

This inconsistency of views between the Fifth and Ninth Circuits results in unequal treatment under the laws of the United States to claimants who, having pleaded guilty to a violation of the customs laws, seek return of their property seized without notice or opportunity to be heard.

2. The Decision Below Conflicts In Principle With Decisions Of The United States Supreme Court.

In *Fuentes v. Shevin*, 407 U.S. 67 (1972) this Court held that it was unconstitutional to deprive an individual of his property without prior notice and an opportunity to be heard. The holding recognized, however, that extra-

ordinary situations may justify a departure from strict compliance with this rule and allow postponement of the hearing until after the seizure. When such a situation occurs it is incumbent upon the Government to institute post-seizure proceedings without delay. At what point then does the delay become impermissable?

In *United States v. Thirty-Seven Photographs, supra,* this Court found that a thirteen-day delay in instituting proceedings to consummate the forfeiture of obscene pictures seized under 19 U.S.C. § 1305(a) was permissible. Section 1305(a) directs a customs collector, seizing obscene materials, to inform the appropriate district attorney, who shall institute forfeiture proceedings in the district court. This Court held further that any delay in commencing proceedings of more than fourteen days would be impermissible and further required completion of the proceedings within sixty days of their commencement.

The cases decided by the United States Courts of Appeals since *Thirty-Seven Photographs, supra,* evidence some confusion as to the validity and applicability of 19 U.S.C. §§ 1602-1604 to post-seizure forfeiture proceedings after conviction on the related criminal charge. The Ninth Circuit would apply § 1602 and § 1604 as they contain provisions requiring immediate disposition as to seized property; it refused to apply § 1603 before its amendment due to the absence of such provisions. *Ivers, supra.* The Tenth Circuit Court of Appeals, even before the amendment of § 1603, read a

requirement of immediacy into § 1603 and has applied all three sections, 1602 through 1604, in deciding whether the Government has acted with sufficient promptitude in bringing forfeiture proceedings; *Sarkisian v. United States*, 472 F.2d 468 (C.A. 10-1973), held that a nine-month delay in bringing about a civil forfeiture proceeding was impermissible under §§ 1602-1604. In *United States v. One Motor Yacht Named Mercury*, 527 F.2d 1112 (C.A. 1-1975), the First Circuit affirmed the holding of the district court that a twelve-month delay violated the immediacy requirements of § 1602-1604 and ordered the return of a yacht seized for allegedly transporting a quantity of marijuana into the United States. The Fourth Circuit is in accord, having construed § 1603 to contain an immediacy requirement even before the amendment and scrutinizing governmental actions to determine if they comply with §§ 1602-1604. *States Marine Lines, Inc. v. Shultz*, 498 F.2d 1146 (C.A. 4-1974).

The Fifth Circuit evidently now refuses to apply any part of §§ 1602-1604 in the case of a plea of guilty and bars a claimant from raising the due process issue altogether.

The Constitution, United States statutes and case law clearly limit the Government's discretion in deciding when to commence forfeiture proceedings. Of what consequence are such limits, however, if the courts, in their discretion, may refuse to consider either the statutory guidelines requiring promptness or Fifth Amendment rights to due process in deter-

mining whether the Government has acted with sufficient promptness?

In *United States v. Coin and Currency*, 401 U.S. 715 (1970), this Court held that the Fifth Amendment right against self-incrimination applied to civil forfeiture proceedings.

> ". . . As *Boyd v. United States*, 116 U.S. 616, 634 (1886), makes clear, proceedings instituted for 'the purpose of declaring the forfeiture of a man's property by reason of offenses commited by him, though they may be civil in form, are in their nature criminal for Fifth Amendment purposes.' From the relevant constitutional standpoint there is no difference between a man who 'forfeits' $8,674.00 because he has used the money in illegal gambling activities and a man who pays a 'criminal fine' of $8,674.00 as a result of the same conduct. In both cases, money liability is predicated upon a finding of the owner's wrongful conduct; in both cases, the Fifth Amendment applies with equal force." 401 U.S. 715, pp. 720-721.

This case presents an opportunity for this Court to clarify that the right to a speedy trial applies with no less force to civil forfeiture proceedings.

The district judge stated in the concluding paragraph of his opinion that a prompt judicial forfeiture proceeding served ". . . only one purpose: to permit claimants a reasonable opportunity to assert the invalidity of the seizure." This is far too narrow an interpretation of the purpose of a post-seizure forfeiture proceeding. The true purpose is to show whether the Government has acted legally in the seizure *and in bringing forfeiture proceedings*. This preserves the integrity of governmental action under the Constitution. The Government, as plaintiff, is required to put on its proof that the seizure and forfeiture proceedings have been pursued in a constitutional manner. The Government is not entitled to a free ride civilly when the claimant pleads guilty. [Pub. Law 95-410; 92 Stat. at Lge. 896]

Whether the requirement of immediacy in post-seizure forfeiture proceedings flows from 19 U.S.C. §§ 1602 through 1604 or from the Fifth Amendment there should be no question that an eighteen-month delay caused by the unfettered discretion of the United States Attorney cannot be upheld. The determination of the Fifth Circuit in the present case extends the period during which forfeiture proceedings may be commenced beyond permissible constitutional limits as announced by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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June 15, 1981

CERTIFICATE OF SERVICE

I HEREBY certify that three true and correct copies of the above and foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been served on opposing counsel by depositing said three copies in the United States mail, postage prepaid, addressed to Hon. Wade H. McCree, Jr., Solicitor General of the United States, Department of Justice, Washington, D.C. 20530 and one true and correct copy has been served on Hon. John Volz, United States Attorney, 500 Camp Street, New Orleans, Louisiana 70130, this ____ day of June, 1981.

I FURTHER CERTIFY that all other parties required to be served have been served.

JOHN A. STASSI II

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 80-3281

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

THIRTY-SIX THOUSAND, ONE HUNDRED AND TWENTY-FIVE DOLLARS ($36,125.00) IN U.S. CURRENCY, THIRTY-FIVE DOLLARS ($35.00) IN COLOMBIAN CURRENCY, AND THIRTY-THREE DOLLARS ($33.00) IN BELIZE CURRENCY,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana

March 16, 1981

Before GOLDBERG, AINSWORTH and RUBIN, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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1 *See* N.L.R.B. v. Amalgamated Clothing Workers of America, 430 F.2d 966 (5th Cir. 1970).

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA

versus CA No. 79-1783
SECTION "H"

THIRTY-SIX THOUSAND, ONE HUNDRED AND TWENTY-FIVE DOLLARS ($36,125.00) IN U.S. CURRENCY, THIRTY-FIVE DOLLARS ($35.00) IN COLOMBIAN CURRENCY, AND THIRTY-THREE DOLLARS ($33.00) IN BELIZE CURRENCY

Filed: April 1, 1980

REASONS FOR JUDGMENT

On October 27, 1977, David L. Albrecht arrived at New Orleans International Airport from Honduras, Central America. In response to the question: "Are you carrying over $5000.00 in coin, currency, or monetary instruments?" on the Customs Declaration form signed by him, Albrecht answered "No". He was arrested by U.S. Customs Agents after the discovery by them in his luggage and on his person of over $36,000.00 in U.S. Currency and about $70.00 of Colombian and Belize currency.

The money was seized by the United States and is the subject of this forfeiture proceeding. The case was tried

to the court on stipulated facts. Claimants do not contest the validity of the arrest or the seizure. Their sole contention is that by reason of the delay involved, the government's right of forfeiture has been lost. The government's position is that the proceedings were filed promptly and that any delay was justified by the pendency of further criminal investigations concerning Albrecht. Alternatively, the government contends that Albrecht in any event cannot urge the delay as a defense to the forfeiture.

The court orders the forfeiture for the following reasons.

Albrecht was arrested for violation of 31 U.S.C. § 1101(a)(1)(B) and § 1058.[1] The currency was seized

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1 § 1101. Reports

Persons required to file

(a) Except as provided in subsection (c) of this section, whoever, whether as principal, agent, or bailee, or by an agent or bailee, knowingly —

(1) transports or causes to be transported monetary instruments —

(A) from any place within the United States to or through any place outside the United States, or

(B) to any place within the United States from or through any place outside the United States, or

(2) receives monetary instruments at the termination of their transportation to the United States from or through any place outside the United States

in an amount exceeding $5,000 on any one occasion shall file a report or reports in accordance with subsection (b) of this section.

§ 1058. Criminal penalty

Whoever willfully violates any provision of this chapter or any regulation under this chapter shall be fined not more than $1,000, or imprisoned not more than one year, or both.

pursuant to 31 U.S.C. § 1102.[2] On December 15, 1977, Albrecht was indicted by the grand jury for violation of 18 U.S.C. § 1001.[3] On March 3, 1978, Albrecht entered a plea of guilty to a superseding bill of information charging him with violation of 31 U.S.C. § 1101(a)(1)(B) and § 1058. The imposition of sentence was suspended and Albrecht was placed on supervised probation for a period of three years and fined $1,000.00.[4] The original indictment was dismissed.

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2 § 1102. Forfeiture

(a) Any monetary instruments which are in the process of any transportation with respect to which any report required to be filed under section 1101(a) of this title either has not been filed or contains material ommisions or misstatements are subject to seizure and forfeiture to the United States.

(b) For the purpose of this section, monetary instruments transported by mail, by any common carrier, or by any messenger or bailee, are in process of transportation from the time they are delivered into the possession of the postal service, common carrier, messenger, or bailee until the time they are delivered into or retained in the possession of the addressee or intended recipient or any agent of the addressee or intended recipient for purposes other than further transportation within, or across any border of, the United States.

3 § 1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

4 The payment of the fine was suspended pending the final resolution of the forfeiture proceedings by the U.S. Customs service.

This suit was filed on May 17, 1979, approximately eighteen months after the seizure of the money and fourteen months after the entry of Albrecht's guilty plea. Claimants[5] contend that the delay in the institution of these proceedings violated the duty imposed upon the government by 19 U.S.C. §§ 1602-1604 to institute forfeiture proceedings promptly and constituted a taking of property without due process of law.

The first issue presented is whether 19 U.S.C. §§ 1602-1604[6] are applicable to seizures under 31 U.S.C.

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5 The claimants in these proceedings are Albrecht and a California law firm which claims under an assignment executed by Albrecht approximately fourteen months after the seizure. Since the assignees' claim can be no better than the assignor's, we treat Albrecht as the sole claimant.

6 § 1602. Seizure; report to collector

It shall be the duty of any officer, agent, or other person authorized by law to make seizures of merchandise or baggage subject to seizure for violation of the customs laws, to report every such seizure immediately to the collector for the district in which such violation occurred, and to turn over and deliver to such collector any vessel, vehicle, merchandise, or baggage seized by him, and to report immediately to such collector every violation of the customs laws.

§ 1603. Same; customs officer's reports

Whenever a seizure of merchandise for violation of the customs laws is made, or a violation of the customs laws is discovered, and legal proceedings by the United States attorney in connection with such seizure or discovery are required, it shall be the duty of the appropriate customs officer to report promptly such seizure or violation to the United States attorney for the district in which such violation has occurred, or in which such seizure was made, and to include in such report a statement of all the facts and circumstances of the case within his knowledge, with the names of the witnesses and a citation to the statute or statutes believed to

§ 1102. In *Ivers v. United States*, 581 F.2d 1362 (9th Cir. 1978) the Ninth Circuit was presented with the same question in a factual context similar to the present case. However, the court in *Ivers* never decided whether those sections were applicable to seizures under 31 U.S.C. § 1102 due to the fact that the only delay of any significance occurred during that stage of the proceedings covered by § 1603 which until its recent amendment imposed no obligation of promptness. We agree with the *Ivers* court's conclusion that the duty of customs authorities to act expeditiously in post-seizure forfeiture proceedings is an obligation imposed independently by the Constitution and that therefore it is unnecessary to decide the applicability *vel non* of 19 U.S.C. §§ 1602-1604.

We also adopt the following from the *Ivers* opinion at pp. 1367-68.

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have been violated, and on which reliance may be had for forfeiture or conviction.

§ 1604. Same; prosecution

It shall be the duty of every United States attorney immediately to inquire into the facts of cases reported to him by customs officers and the laws applicable thereto, and if it appears probable that any fine, penalty, or forfeiture has been incurred by reason of such violation, for the recovery of which the institution of proceedings in the United States district court is necessary, forthwith to cause the proper proceedings to be commenced and prosecuted, without delay, for the recovery of such fine, penalty, or forfeiture in such case provided, unless, upon inquiry and examination, such United States attorney decides that such proceedings can not probably be sustained or that the ends of public justice do not require that they should be instituted or prosecuted, in which case he shall report the facts to the Secretary of the Treasury for his direction in the premises.

When a statute provides for the forfeiture of property as a consequence of the commission of an unlawful act, "the forfeiture takes effect immediately upon the commission of the act," constituting "a statutory transfer of the right to the United States at the time the offense is committed." *United States v. Stowell*, 133 U.S. 1, 16-17, 10 S.Ct. 244, 247, 33 L.Ed. 555 (1890); *Simons v. United States*, 541 F.2d 1351, 1352 (9th Cir. 1976). This right, however, must be "defined and consummated" by the judgment or decree of a court. *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 461, 19 L.Ed. 196 (1898).

Ordinarily, of course, the Constitution demands that a person not be deprived of his property without previously having been afforded notice of the proposed action and an opportunity to be heard. *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972). "[E]xtraordinary situations," however, may justify a departure from this mandate and permit postponement of notice and opportunity for a hearing. *Id.* at 90, 92 S.Ct. 1983. Seizure of property for forfeiture to the Government is such a situation. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974); *United States v. One 1967 Porsche*, 492 F.2d 893 (9th Cir. 1974). In that situation, post-seizure notice and hearing are

justified by the facts that seizure is "directly necessary to secure an important governmental or general public interest," that there is a "special need for very prompt action," and that seizure is initiated by "a government official responsible for determining, under the standards of a narrowly drawn statute, that it [is] necessary and justified in the particular instance." *Fuentes*, 407 U.S. at 91, 92 S.Ct. at 2000; *Calero-Toledo*, 416 U.S. at 678-80, 94 S.Ct. 2080. We find these justifications adequately presented here.

While relieved of the necessity for a pre-seizure hearing, governmental officials in this area are not endowed with an unfettered discretion in choosing when to institute the requisite judicial proceedings. Due process requires that these proceedings be commenced with some promptitude. The Supreme Court has recognized this in the context of a seizure of obscene photographs under Section 305 of the Tariff Act of 1930, 19 U.S.C. § 1305(a), in *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971). The general applicability of this principle to seizure cases has been confirmed by this court, by our sister circuits, and by a number of the district courts. *United States v. 2,200 Paper Back Books*, 565 F.2d 500 (9th Cir. 1977); *United States v. One*

1970 Ford Pickup, 564 F.2d 864 (9th Cir. 1977); *Lee v. Thornton*, 538 F.2d 27 (2d Cir. 1976); *United States v. One (1) 1972 Wood, 19 Foot Custom Boat*, 501 F.2d 1327 (5th Cir. 1974); *States Marine Lines, Inc. v. Shultz*, 498 F.2d 1146 (4th Cir. 1974); *Sarkisian v. United States*, 472 F.2d 468 (10th Cir.), *cert. denied*, 414 U.S. 976, 94 S.Ct. 291, 38 L.Ed.2d 219 (1973); *United States v. One (1) Douglas A-26B Aircraft*, 436 F.Supp. 1292 (S.D.Ga. 1977); *United States v. A Quantity of Gold Jewelry*, 379 F.Supp. 283 (C.D.Cal. 1974); *United States v. One 1971 Opel G. T.*, 360 F. Supp. 638 (C.D. Cal. 1973).

Forfeiture statutes which fail to impose an explicit obligation upon the Government to commence prompt judicial proceedings have been construed to require administrative and judicial action within specific time limits in order to avoid a finding of facial unconstitutionality. *United States v. Thirty-Seven Photographs, supra*, 402 U.S. at 368, *et seq.*, 91 S.Ct. 1400; *Lee v. Thornton, supra*, 538 F.2d at 31; *States Marine Lines Inc. v. Shultz, supra*, 498 F.2d at 1155; *Sarkisian v. United States, supra*, 472 F.2d at 472.

The time which elapsed between seizure and filing of suit in the instant case is about the same as that involved in *Ivers*, approximately eighteen months. In *Ivers*, the court found that the delay did not violate the due

process rights of the claimant because the claimant's own conduct was such as to excuse and justify the government's delay.

We conclude that the delay here was justified by other reasons (a continuing investigation of claimant and others for other possible offenses), and as an alternative basis for our judgment we hold that his plea of guilty to a crime encompassing all of the facts which justify the forfeiture bars claimant from raising the due process issue.

After he was taken into custody, the Customs Service initiated an investigation of Albrecht in order to obtain evidence for use in the prosecution of the violations for which he was arrested as well as possible further charges, including violation of 31 U.S.C. 1059(1).

After his guilty plea, the investigation of Albrecht continued. In December of 1979, witnesses appeared before a Grand Jury; the parties stipulated that the investigation is still ongoing. However, the claimants deny that the continuation of an investigation as to other possible violations has any relevancy to these proceedings. We disagree.

During the entire period from the date Albrecht pleaded guilty to the date the forfeiture proceeding was filed, serious investigation of possible further criminal activity by him and others was being conducted by the

government. The filing of civil forfeiture proceedings during that period could have jeopardized other prosecutions against Albrecht and could have adversely affected the investigation. That such a good faith investigation was pending must be considered as a factor in the delay in instituting this forfeiture proceeding.

Finally, we hold that when a claimant to property seized without a hearing is prosecuted promptly and pleads guilty to committing every act which the government would have to prove in a civil forfeiture proceeding, he is barred from claiming the seized property, where the sole basis for his claim is that the civil forfeiture proceedings were not instituted promptly. Whether founded upon statute, regulation, or a judicial due process basis, a requirement that a seizure without notice or hearing be followed by a prompt judicial forfeiture proceeding serves only one purpose: to permit claimants a reasonable opportunity to assert the invalidity of the seizure. There is no such purpose to be served when the only claimant has judicially confessed to every fact necessary to justify the seizure. Indeed, Albrecht continues in these proceedings to admit judicially that the seizure was proper and that, but for the delay, so too would be the forfeiture.

April 1, 1980

/s/ ADRIAN G. DUPLANTIER
U.S. DISTRICT JUDGE

APPENDIX C

STATUTORY PROVISIONS INVOLVED

United States Code, Title 31

§ 1101. Reports

Persons required to file

(a) Except as provided in subsection (c) of this section, whoever, whether as principal, agent or bailee, or by an agent or bailee, knowingly—

(1) transports or causes to be transported monetary instruments —

(A) from any place within the United States to or through any place outside the United States, or

(B) to any place within the United States from or through any place outside the United States, or

(2) receives monetary instruments at the termination of their transportation to the United States from or through any place outside the United States

in an amount exceeding $5,000.00 on any one occasion shall file a report or reports in accordance with subsection (b) of this section.

Contents of filed report

(b) Reports required under this section shall be filed at such times and places, and may contain such of the following information and any additional information, in such form and in such detail, as the Secretary may require:

(1) The legal capacity in which the person filing the report is acting with respect to the monetary instruments transported.

(2) The origin, destination, and route of the transportation.

(3) Where the monetary instruments are not legally and beneficially owned by the person transporting the same, or are transported for any purpose other than the use in his own behalf of the person transporting the same, the identities of the person from whom the monetary instruments are received, or to whom they are to be delivered, or both.

(4) The amounts and types of monetary instruments transported.

Common carriers

(c) Subsection (a) of this section does not apply to any common carrier of passengers in respect of monetary

instruments in the possession of its passengers, nor to any common carrier of goods in respect of shipments of monetary instruments not declared to be such by the shipper.

United States Code, Title 31

§ 1102. Forfeiture

(a) Any monetary instruments which are in the process of any transportation with respect to which any report required to be filed under section 1101(a) of this title either has not been filed or contains material ommissions or misstatements are subject to seizure and forfeiture to the United States.

(b) For the purpose of this section, monetary instruments transported by mail, by any common carrier, or by any messenger or bailee, are in process of transportation from the time they are delivered into the possession of the postal service, common carrier, messenger, or bailee until the time they are delivered into or retained in the possession of the addressee or intended recipient or any agent of the addressee or intended recipient for pusposes other than further transportation within, or across any border of, the United States.

United States Code, Title 31

§ 1104. Remission of forfeiture or penalty

The Secretary may in his discretion remit any forfeiture or penalty under this subchapter in whole or in part upon such terms and conditions as he deems reasonable and just.

United States Code, Title 31

§ 1058. Criminal penalty

Whoever willfully violates any provision of this chapter or any regulation under this chapter shall be fined not more than $1,000, or imprisoned not more than one year, or both.

United States Code, Title 19

§ 1602. Seizure; report to customs officer

It shall be the duty of any officer, agent or other person authorized by law to make seizures of merchandise or baggage subject to seizure for violation of the customs laws, to report every such seizure immediately to the appropriate customs officer for the district in which such violation occurred, and to turn over and deliver to such customs officer any vessel, vehicle, merchandise, or baggage seized by him, and to report immediately to such

customs officer every violation of the customs laws.

United States Code, Title 19

§ 1603. Seizure; customs officer's reports

Whenever a seizure of merchandise for violation of the customs law is made, or a violation of the customs law is discovered, and legal proceedings by the United States attorney in connection with such seizure or discovery are required, it shall be the duty of the appropriate customs officer to report promptly such seizure or violation to the United States attorney for the district in which such violation has occurred, or in which such seizure was made, and to include in such report a statement of all facts and circumstances of the case within his knowledge, with the names of the witnessess and a citation to the statute or statutes believed to have been violated, and on which reliance may be had for forfeiture or conviction.

United States Code, Title 19

§ 1604. Seizure; prosecution

It shall be the duty of every United States attorney immediately to inquire into the facts of

cases reported to him by customs officers and the laws applicable thereto, and if it appears probable that any fine, penalty or forfeiture has been incurred by reason of such violation, for the recovery of which the institution of proceedings in the United States district court is necessary, forthwith to cause the proper proceedings to be commenced and prosecuted, without delay, for the recovery of such fine, penalty, or forfeiture in such case provided, unless, upon inquiry and examination, such United States attorney decides that such proceedings can not probably be sustained or that the ends of public justice do not require that they should be instituted or prosecuted, in which case he shall report the facts to the Secretary of the Treasury for his direction in the premises.

United States Code, Title 19

§ 1610. Seizure; value more than $10,000

If the value of any vessel, vehicle, merchandise, or baggage so seized is greater than $10,000, the appropriate customs officer shall transmit a report of the case, with the names of available witnesses, to the United States attorney for the district in which the seizure was made for the institution of the proper proceedings for the condemnation of such property.